

NO. _____

Linda Elizabeth Harrison and
Vernon Webb,
Plaintiffs

§ IN THE DISTRICT COURT

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§
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v.

§ OF TRAVIS COUNTY, TEXAS

Dana DeBeauvoir, in her official capacity
as Travis County Clerk,

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§
§
§

Defendant

§ _____ JUDICIAL DISTRICT

**PLAINTIFF'S ORIGINAL PETITION AND EMERGENCY APPLICATION FOR
TEMPORARY RESTRAINING ORDER**

1. Plaintiffs hereby file this Original Petition and Emergency Application for Temporary Restraining Order. In support of same, Plaintiffs respectfully show the Court as follows:

**I.
BACKGROUND**

2. This Petition seeks declaratory and injunctive relief that Texas Election Code § 102.002 as applied to the Plaintiff and on its face, is unconstitutional on the grounds that it violates the Equal Protection Clause of the Texas Constitution.

**II.
DISCOVERY CONTROL PLAN**

3. Pursuant to Texas Rule of Civil Procedure 190.1, Plaintiffs intend to conduct discovery under Discovery Level 3.

III.
PARTIES

4. Plaintiffs Linda Elizabeth Harrison and Vernon Webb, are registered voters in Travis County. Plaintiffs each received a positive test result for COVID-19 after the deadline to request a mail-in ballot that passed on July 2, 2020. Plaintiffs are each under quarantine to prevent the spread of COVID-19, and desire to vote by absentee ballot.

5. Defendant Dana DeBeavoir is the Travis County Clerk and is sued in her official capacity only. Defendant's duties include conducting elections for Travis County, as well as the qualifying of applications for ballot by mail and emergency absentee ballots. She may be served with process at the County Clerk's office located at 1000 Guadalupe St, Austin, TX 78701.

6. At all times relevant hereto, Defendant has been acting under color of statutes, ordinances, regulations, customs and usages of the State of Texas and Travis County, Texas.

IV.
JURISDICTION AND VENUE

7. Plaintiffs seek non-monetary relief of declaratory and injunctive relief. This Court's jurisdiction to enter declaratory relief in this lawsuit is established by Texas Civil Practice and Remedies Code Section 37.001, *et seq.* This Court's jurisdiction to enter injunctive relief in this lawsuit is established by Texas Civil Practice and Remedies Code Section 65.001, *et seq.*, and Texas Election Code Section 273.081.

8. Travis County is the proper venue for this lawsuit because Plaintiffs are Travis County residents and the actions of which Plaintiffs complain occurred and are occurring in

Travis County. *See* Tex. Civ. Prac. & Rem. Code § 15.002. The Court further has jurisdiction over Defendants because the doctrine of governmental immunity is inapplicable to county officials sued in their official capacity for ultra vires actions, which is the claim Plaintiff brings against Defendants. *See Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154 (Tex. 2016).

V.
FACTS

9. Plaintiffs Linda Elizabeth Harrison and Vernon Webb are each registered voters in Travis County, Texas residing at 510 South Park Drive, Austin, Texas, 78704. On June 30, 2020, Ms. Harrison was tested for COVID-19 by LabCorp after experiencing symptoms of the disease, including coughing and congestion. On July 2, 2020, she received informal test results from an online portal that indicated a positive test result for COVID-19. Following this result, Mr. Webb, Ms. Harrison's husband, was also tested on July 4, 2020. On or about July 5, 2020, a physician contacted Ms. Harrison and confirmed that she was positive for COVID-19 and instructed her to remain in quarantine. Similarly, Mr. Webb was notified that his test result was positive for COVID-19 on July 9, 2020.

10. Plaintiffs each continue suffering severe symptoms from COVID-19, including respiratory problems and fatigue, and each are under medical orders to self-quarantine and cannot visit a polling location in person to vote without a likelihood of injuring their health and spreading disease to other non-infected individuals. Plaintiffs are not in a condition to use curbside voting due to their symptoms.

11. The Texas Election Code provides that the deadline to apply for a mail-in ballot for purposes of a disability is 11 days prior to election day. Tex. Elec. Code 84.007(c). If an illness

arises after this deadline, a voter can only vote absentee by applying for an emergency absentee ballot. *See* Tex. Elec. Code 102.001 *et seq.* To apply for this emergency absentee ballot, the voter also must submit a doctor’s certification regarding the claimed illness—a requirement that is not imposed on regular mail-in ballot voters. *Id.* at 102.002.

12. Accordingly, if a voter had tested positive for COVID-19 with enough time for their mail ballot application to have been actually received prior to the mail-in ballot application deadline (likely June 29 or 30 to account for the time for mail delivery), that voter would be entitled to self-identify as having a disability qualifying for mail-in ballot eligibility, while the same exact diagnosis on July 2, 2020, requires the voter to incur the additional burden and expense of obtaining a very particular doctor’s certification with substance dictated by statute—a requirement with which the voter may not be able to comply with through no fault of their own.

12. Plaintiffs in this case first learned of the requirement to submit a doctor’s certification on July 13, 2020. The Plaintiffs contacted their medical care provider’s office in order to attempt to obtain a physician’s certificate that same day, by phone and by e-mail. Plaintiffs have yet to hear back from their physician, and so can not comply with the doctor’s certification requirement to vote by absentee ballot.

13. Due to their recent and ongoing illness, the Plaintiffs will be barred from voting entirely in the July 14, 2020 primary runoff election if they are required to comply with doctor’s certification provision in the Texas Election Code.

VI. **CAUSES OF ACTION**

A. Defendants’ Actions Violate The Equal Protection Clause of the Texas Constitution

Defendants failure to provide Plaintiffs with the same opportunity to self-identify their

eligibility for an absentee ballot violates the guarantees of equal protection in the Texas Constitution. *See* Tex. Const. Art. I, § 3; *Gatesco Q.M. Ltd. v. City of Houston*, 503 S.W.3d 607, 621 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 266 (Tex. 2002) (“The legal standard for the equal-protection analysis under article I, section 3 of the Texas Constitution is the same as the legal standard for the analysis under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.”)).

Plaintiffs are highly likely to prevail on the merits of their Equal Protection Clause claim. The Supreme Court has held that imposing different mail-in ballot restrictions on similarly situated voters raises Equal Protection Clause concerns. In *O’Brien v. Skinner*, 414 U.S. 524 (1974), the Supreme Court struck down as unconstitutional a scheme that arbitrarily denied mail-in ballots to certain classes of individuals who were unable to vote in person while affording that opportunity to others. *Id.* at 530; *see also Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012) (finding a violation of the Equal Protection Clause where the State allowed members of the military to vote early in person the three days prior to the Election, but not other voters).

In this instance, the Texas Election Code arbitrarily distinguishes between two groups of voters who are unable to vote in person and must vote by mail to avoid disenfranchisement. In one group are individuals who claim a qualifying disability under Section 82.002 prior to the cut-off for applying to vote by mail. These individuals are only required to self-attest to their disability under Texas Election Code Section 82.002. In the other group are individuals like the Plaintiffs who develop a qualifying illness or disability *after* the cutoff for applying to vote by

mail. Despite being equally situated in their inability to vote in person and their qualifications for an absentee ballot under Texas Election Code Section 82.002, these individuals are subject to the separate, unequal and burdensome requirement that they obtain “a certificate of a licensed physician or chiropractor or accredited Christian Science practitioner.” Tex. Elec. Code 102.002. This arbitrary discrimination between these two groups is an unconstitutional violation of Texas’ equal protection clause.

Further, in the current circumstances with the COVID-19 pandemic raging, this requirement imposes an extremely severe burden on Plaintiffs exercising their right to vote. Plaintiffs took and were diagnosed with a COVID-19 through a service that is separate from their normal practitioner. After being diagnosed with COVID-19, they have been instructed to self-quarantine and thus are unable to vote in person. Although they have attempted to contact their general physician to receive the certification required by Section 102.002, they have been unable to do so. Indeed, COVID-19 has caused a great strain on the medical systems in Texas. Plaintiffs are unable to visit their doctor in person because of their quarantine and despite their best efforts have been unable to speak with their physician or obtain the certification.

B. Defendants’ Actions Violate the Texas Constitutions’ Protections of the Fundamental Right To Vote.

The requirements for a doctor’s certification under Tex. Elec. Code Section 102.002 will disenfranchise Plaintiffs and serve no corresponding governmental interest. Hence, they represent an undue burden on the fundamental right to vote as protected by the Texas Constitution. Texas courts conduct constitutional voting rights claims analysis under the same rubric as federal courts—applying a balancing test commonly called the *Anderson-Burdick* test. *See Andrade v. NAACP of Austin*, 345 S.W.3d 1, 12 (Tex. 2011) (citing *Burdick v. Takushi*, 504

U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

The right to vote is a fundamental constitutional right, protected under the Equal Protection Clause from undue burden. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (describing the right to vote as “too precious, too fundamental” to be burdened or conditioned); *see also State v. Fletcher*, 50 S.W.2d 450, 452 (Tex. Civ. App. 1932), writ dismissed (“The right to vote is a constitutional right”). The right is “protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.” *Bush v. Gore*, 531 U.S. 98, 104 (2000). It also “applies when a state either classifies voters in disparate ways . . . or places restrictions on the right to vote.” *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012).

When assessing an Equal Protection challenge to a state restriction on the right to vote, courts scrutinize the restriction using a standard established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Under the *Anderson-Burdick* standard, a court “must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the [s]tate as justifications for the burden imposed by its rule.’” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789); *see also Harper*, *supra*, 383 U.S. at 670 (“We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”).

This court should be guided by the approach taken repeatedly by federal courts, applying the *Anderson-Burdick* standard in cases involving a range of voting rights and election

administration issues. In *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), the Supreme Court “reaffirmed *Anderson*’s requirement that a court evaluating a constitutional challenge to an election regulation weigh the asserted injury to the right to vote against the ‘precise interests put forward by the [s]tate as justification for the burden imposed by its rule.’” *Id.* at 190-191 (quoting *Anderson*, 460 U.S. at 789). Likewise, in *Kucinich v. Texas Democratic Party*, 563 F.3d 161 (5th Cir. 2009), the Fifth Circuit noted that *Anderson* and *Burdick* “balance the individual’s rights against state imposed requirements.” *Id.* at 168 n.6; *see also Wilson v. Birnberg*, 667 F.3d 591, 598 (5th Cir. 2012). And, even more recently, the Sixth Circuit explained that the *Anderson-Burdick* standard is “sufficiently flexible to accommodate the complexities of state election regulations while also protecting the fundamental importance of the right to vote.” *Obama for Am. v. Husted*, *supra*, 697 F.3d at 429 (rejecting defendants’ request for application of a different standard for reviewing a voting restriction).

Defendant’s practice effectively treats Plaintiffs and voters who were diagnosed with the same illness just a few days prior in a different manner, allowing one to self-attest to their illness while requiring the other to obtain a doctor’s certification, imposing additional burdens and costs. *Obama for America v. Husted*, 697 F.3d 423, 431-32, 436 (6th Cir. 2012) (Court found early voting state restriction unjustifiably burdened non-military voters, and, thus, violated the Equal Protection Clause); *Anderson*, 460 U.S. 786-806. Specifically, because they were diagnosed with COVID right after the July 2 deadline, Plaintiffs are now subject to the doctors’ note requirement that, under the circumstances, is impossible for them to satisfy. The harm of disenfranchisement outweighs whatever plausible interest the Defendants could claim in requiring a notarized doctors’ note to verify Plaintiffs’ illness in this time of global pandemic,

much less a sufficiently important one that might justify depriving Plaintiffs' of their right to vote. *Stringer, et al. v. Pablos, et al.*, 320 F.Supp.3d 862, 900 (W.D. Tex. 2018).

VIII.
APPLICATION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY
INJUNCTION

Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

A. Plaintiffs establish a “strong likelihood” of success on the merits.

For the reasons stated above, Plaintiffs are highly likely to prevail on the merits of their claims that Defendants violate their right to vote as protected by the Texas Constitution.

B. Plaintiffs will be irreparably harmed by Defendants' actions.

Due to Defendants' violations, Plaintiffs suffer an immediate and irreparable harm from having their constitutionally and statutorily protected right to vote infringed. *Williams v. Salerno*, 792 F.2d 323, 326 (2nd Cir. 1986) (plaintiffs suffer irreparable harm if their right to vote is impinged upon); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (“A restriction on the fundamental right to vote . . . constitutes irreparable injury”). There is no question that the imminent threat of disenfranchisement constitutes an irreparable injury, as voting is a fundamental right and the loss of that right cannot be remedied by monetary damages. Indeed, “the right to vote is not something that can ordinarily be replaced by any amount of money.” *Spirit Lake Tribe v. Benson Cty.*, No. 2:10-CV-095, 2010 WL 4226614, at *4 (D. N.D. Oct. 21, 2010).

“Once a citizen is deprived of his right of suffrage in an election there is usually no way to remedy the wrong. There is no process for ordering ‘re-votes’ . . . Once an election is over, it is over and it is little consolation to say that the problem will be remedied in the next election.”

Id. at 5; *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“once [an] election occurs, there can be no do-over and no redress.”).

C. Plaintiffs Threatened Injuries Outweigh any Alleged Injuries to the County

The costs associated with waiving the doctors’ note requirement of the emergency voting practices to allow Plaintiffs to apply for a ballot are nonexistent. There is no apparent interest in requiring this certification, apparent by the fact that similar certification is not required for any other voter who votes by mail.

D. A Temporary Restraining Order would Serve the Public Interest

The public interest lies in greater voter participation and access to the polls, and lies in Plaintiffs favor. This is particularly true here, as tens of thousands of Texans have been diagnosed with COVID since the July 2 deadline for a vote-by-mail ballot. *See Husted*, 697 F.3d at 437 (public interest favors permitting as many qualified voters to vote as possible); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U. S. 173, 184 (1979) (“voting is of the most fundamental significance under our constitutional structure.”). Granting this petition will ease voting for all of these sick Texans and will create a regulatory scheme that better promotes equal access for all Texans.

E. Request for Relief

For all the foregoing reasons, Plaintiffs request that this Court grant their application for a temporary restraining order, and enjoin the Defendant from enforcing the doctor’s certification provision of the Texas Election Code in determining a voter’s eligibility for an emergency absentee ballot.

**IV.
PRAYER**

THEREFORE, Plaintiffs respectfully pray for the following relief: judgment against Defendant in the form of declaratory relief declaring that the requirement for a physician's certificate under Tex. Elec. Code Section 102.002 is unconstitutional as applied to Plaintiffs and an injunction ordering Defendant to accept and process Plaintiffs' late mail ballot applications without a physician's certificate.

Hearing is set on this matter at ___ p.m. at the ___ District Court to be conducted remotely

Dated: July 14, 2020.

Respectfully submitted,

By: /s/ Joaquin Gonzalez

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of July, 2020, a true and correct copy of the foregoing *Application for Temporary Restraining Order* was served upon defendant via email at Dana.Debeauvoir@traviscountytx.gov, Sherine.Thomas@traviscountytx.gov, and Leslie.Dippel@traviscountytx.gov.

/s/ Joaquin Gonzalez

**CERTIFICATE OF COMPLIANCE WITH LOCAL RULES REGARDING
APPLICATION FOR A TEMPORARY RESTRAINING ORDER**

I, Joaquin Gonzalez, certify that Defendants have been notified that Plaintiffs will seek immediate injunctive relief from this Court on the grounds stated their Complaint and this Application as soon as the matter could be heard.

/s/ Joaquin Gonzalez

VERIFICATION

I, Joaquin Gonzalez, am counsel for Plaintiffs in this action.

I have read the foregoing Complaint for Injunctive Relief and know the contents thereof.

I certify that the same is true of my own knowledge except as to those matters which are therein stated upon information and belief and, as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th Day of July, 2020 at Travis County, Texas.

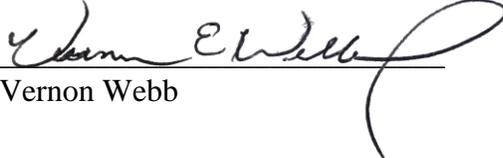
 /s/ *Joaquin Gonzalez*
Joaquin Gonzalez

EXHIBIT 1

7. I still am suffering severe symptoms from COVID, including respiratory problems and fatigue.
8. I am under medical orders to self-quarantine, and cannot visit a polling location in person to vote without a likelihood of injuring my health or spreading disease to other non-infected individuals.
9. I am not in condition to do curbside voting, and do not want to risk infecting the election workers who would have to administer curbside voting.
10. On July 13, 2020, I learned that in order to vote late by mail I would need to provide a physician's certificate.
11. I do not believe I will be able to obtain a physician's certificate in time to vote today and therefore will be unable to vote in the primary runoff election.

I declare under penalty of perjury that the facts stated above are true and correct to the best of my personal knowledge.

Executed in Travis County, State of Texas, on the 14th day of July, 2020.


Vernon Webb

Specimen ID: 188-561-5071-0
Control ID: 68436121

Acct #: 42182820

Phone: (512) 351-4405

Rte: 00

WEBB, VERNON E.
510 S PARK DRIVE
AUSTIN TX 78704

CareNow Buda
1567 Main St. Ste 100
Buda TX 78610



Patient Details

DOB: 11/05/1955
Age(y/m/d): 064/07/29
Gender: M
Patient ID: 6305718

Specimen Details

Date collected: 07/04/2020 1018 Local
Date received: 07/06/2020
Date entered: 07/06/2020
Date reported: 07/09/2020 0107 ET

Physician Details

Ordering: H VU
Referring:
ID:
NPI: 1598136467

General Comments & Additional Information

Alternate Control Number: 68436121

Alternate Patient ID: 6305718

Ordered Items

SARS-CoV-2, NAA; Inpatient

TESTS	RESULT	FLAG	UNITS	REFERENCE INTERVAL	LAB
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SARS-CoV-2, NAA	Detected Abnormal			Not Detected	01
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Testing was performed using the Aptima SARS-CoV-2 assay. This test was developed and its performance characteristics determined by LabCorp Laboratories. This test has not been FDA cleared or approved. This test has been authorized by FDA under an Emergency Use Authorization (EUA). This test is only authorized for the duration of time the declaration that circumstances exist justifying the authorization of the emergency use of in vitro diagnostic tests for detection of SARS-CoV-2 virus and/or diagnosis of COVID-19 infection under section 564(b)(1) of the Act, 21 U.S.C. 360bbb-3(b)(1), unless the authorization is terminated or revoked sooner. When diagnostic testing is negative, the possibility of a false negative result should be considered in the context of a patient's recent exposures and the presence of clinical signs and symptoms consistent with COVID-19. An individual without symptoms of COVID-19 and who is not shedding SARS-CoV-2 virus would expect to have a negative (not detected) result in this assay.

Inpatient

Received

01

01	HD	LabCorp Houston 7207 North Gessner, Houston, TX 77040-3143	Dir: Kyle Eskue, MD
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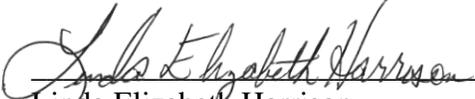
For inquiries, the physician may contact Branch: 713-856-8288 Lab: 713-856-8288

EXHIBIT 2

8. I still am suffering severe symptoms from COVID, including respiratory problems and fatigue.
9. I am under medical orders to self-quarantine and cannot visit a polling location in person to vote without a likelihood of injuring my health or spreading disease to other non-infected individuals.
10. I am not in condition to do curbside voting, and do not want to risk infecting the election workers who would have to administer curbside voting.
11. On July 13, 2020, I learned that in order to vote late by mail I would need to provide a physician's certificate.
12. On July 13, 2020, I contacted my medical care provider's office in order to attempt to obtain a physician's certificate confirming that I developed an illness that prevents me from voting in person on or after the deadline for applying to vote by mail. The nurse told me to email the office with my request. I have still not heard back from the physician. I have called back to the office to follow up but have not had any success getting in touch with a physician or obtaining a certificate.
13. I do not believe I will be able to obtain a physician's certificate in time to vote today and therefore will be unable to vote in the primary runoff election.

I declare under penalty of perjury that the facts stated above are true and correct to the best of my personal knowledge.

Executed in Travis County, State of Texas, on the 14th day of July, 2020.


Linda Elizabeth Harrison

Specimen ID: 182-561-9285-0
Control ID: 68431731

Acct #: 42182820

Phone: (512) 351-4405

Rte: 00

HARRISON, LINDA
510 SOUTH PARK
AUSTIN TX 78704
(512) 799-6885

CareNow Buda
1567 Main St. Ste 100
Buda TX 78610



Patient Details	Specimen Details	Physician Details
DOB: 08/20/1957	Date collected: 06/30/2020 1322 Local	Ordering: J LAINE
Age(y/m/d): 062/10/10	Date received: 07/01/2020	Referring:
Gender: F	Date entered: 07/01/2020	ID:
Patient ID: 6283011	Date reported: 07/01/2020 2307 ET	NPI: 1053896522

General Comments & Additional Information

Alternate Control Number: 68431731

Alternate Patient ID: 6283011

Ordered Items

SARS-CoV-2, NAA; Inpatient

TESTS	RESULT	FLAG	UNITS	REFERENCE INTERVAL	LAB
SARS-CoV-2, NAA	Detected Critical			Not Detected	01

Testing was performed using the Aptima SARS-CoV-2 assay. This test was developed and its performance characteristics determined by LabCorp Laboratories. This test has not been FDA cleared or approved. This test has been authorized by FDA under an Emergency Use Authorization (EUA). This test is only authorized for the duration of time the declaration that circumstances exist justifying the authorization of the emergency use of in vitro diagnostic tests for detection of SARS-CoV-2 virus and/or diagnosis of COVID-19 infection under section 564(b)(1) of the Act, 21 U.S.C. 360bbb-3(b)(1), unless the authorization is terminated or revoked sooner. When diagnostic testing is negative, the possibility of a false negative result should be considered in the context of a patient's recent exposures and the presence of clinical signs and symptoms consistent with COVID-19. An individual without symptoms of COVID-19 and who is not shedding SARS-CoV-2 virus would expect to have a negative (not detected) result in this assay.

Inpatient

Received

01

01	HD	LabCorp Houston 7207 North Gessner, Houston, TX 77040-3143	Dir: Kyle Eskue, MD
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For inquiries, the physician may contact **Branch: 713-856-8288 Lab: 713-856-8288**